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Separation of powers and the independence of constitutional justice

1. Introduction

Separation of Powers is one of the basic structural principles of democratic societies. It was already discussed by ancient philosophers, deep analysis can be found in medieval political and philosophical scientific work, and we base our contemporary discussion on legal theory that has been developed in parallel to the emergence of democratic systems in Northern America and in Europe in the 18th Century.

Separation of Powers is not an end in itself, nor is it a simple tool for legal theorists or political scientists. It is a basic principle in every democratic society that serves other purposes such as freedom, legality of state acts — and independence of certain organs which exercise power delegated to them by a specific constitutional rule.

When we look back to 20 years of a new Constitution and democracy in Russia it is worth to focus on this core principle of modern constitutionalism and combine it with an essential guarantor of the democratic constitutionals state: Constitutional Justice. The independence of constitutional courts is an objective of the separation of powers, independence is its result. This is one aspect, and perhaps the aspect which first occurs to most of us.

Another perspective deals with the reverse relationship: independence of constitutional courts as a precondition for the separation of powers. Independence enables constitutional courts to effectively control the respect for the separation of powers.

Being a scientist and constitutional Judge in Austria, the country with the longest tradition of modern constitutional justice, I would like to contribute to the anniversary conference by adding some thoughts on the relevance of Constitutional Justice and in particular its independence for modern constitutional systems.

2. Two preliminary remarks on the scope of the topic

Before I begin my analysis, I should make two preliminary remarks which are necessary for a proper discussion of the topic. The first remark deals with the definition of what is a constitutional court. The second remark is directed at the differences in the constitutional system in which a constitutional court develops its case law.

a) *Constitutional Courts in Europe*

When I talk about constitutional Courts I refer to the «European type» of constitutional courts. I make reference to the historical roots of constitutional justice in the Europe of the 20th Century. After the establishment of a Constitutional Court in Austria, in 1920, which did not exist between 1934 and 1945 and of the Constitutional Court of Czechoslovakia in 1920, which never became effective, European States have established Constitutional Courts in two waves after 1945 and after 1989. In 1989 a Constitutional Supervision Committee was created in Russia. It was dissolved towards the end of 1991 and the Russian Constitutional Court was established. All these courts have a number of common features, which distinguish them from other systems, which can be called the «American type» of constitutional justice, as they follow the model of the American Supreme Court.

For today's topic, there are fundamental differences in the functions with a view to the Constitution, which have to be mentioned in order to get an accurate answer to the question of the separation of powers. The European type constitutional courts are judicial organs that were entrusted with ensuring normative superiority of the constitution over the remainder of the legal order. Fundamental rights form an integral part of the legal body of constitutional law. In many European systems, individuals are entitled to file applications in order to enforce their rights. At the same time, international human rights were made effective. They have been increasingly influencing the domestic practice over the last six decades.

According to the constitutional thinking of the Austrian legal theorist Hans Kelsen, the ordinary (criminal, civil or administrative) judge had no power at all to decide on the conformity of a law with the constitution. The task of defending the integrity of the hierarchy of norms

is in the exclusive competence of the constitutional court. This is called the «monopoly to annul laws» (*«Normverwerfungsmonopol»*). On the other hand, constitutional courts are limited to deciding constitutional disputes and constitutional questions in disputes involving various questions.

b) *«Younger» and «older» democracies*

It is common ground among all constitutional experts as politicians, who bear responsibility in government, that the social contexts in which a particular constitutional court has been instituted and continues to operate, may vary to a large extent.

A rough division into two groups of constitutional courts takes account of this context: Courts in young democracies and courts in democracies with a longer democratic tradition. In this second group, we find a commitment to functional separation of powers, a certain constitutional culture and especially a high convergence of constitutional law and constitutional practice.

An overview shows that competences of constitutional courts vary considerably. We still find that a number of courts have a limited scope of jurisdiction. In the long run, a limited scope of the constitutional court will hinder it from becoming an effective guarantor of the supremacy of the constitution. The ex post-control of the conformity of laws with the constitution together with the power to set aside laws found unconstitutional may be seen as a key factor for effective constitutional justice.

Another point is decisive: the access of the individual to the constitutional court. This right has proven to be the most important ingredient for successful constitutional justice; examples of young democracies show this, as do established democracies such as Austria or Germany, which have demonstrated it in particular in the second half of the 20th Century.

3. Separation of Powers — a valid concept in today's constitutional theory

Modern legal theory takes due account of what John Locke has formulated in Book II of «Two treatises on Government» and Montesquieu has established in «De l'Esprit des Lois» («The Spirit of Laws»). However, the ideal of checks and balances and of three equivalent

powers had to be adjusted in view of the developments that occurred during the 20th Century.

Separation has always been more than drawing borders, it was the distribution of powers and it was the intertwining or joining of powers.

When we talk about the separation of powers, it is also clear that it comprises functional, institutional and personal separation. The degree and the quality of separation of powers in a particular constitutional system can only be measured if one assesses the extent to which functional separation corresponds to institutional separation, i.e. whether different functions are fulfilled by different institutions and persons that are not directly dependent on organs of other institutions.

In modern constitutionalism, there is a tendency to consider the complexity of inter-organ-relations within one state power. This tendency takes due account of the contribution of the distribution of competences (powers) within a certain state power to the overall quality of the separation of powers. Such a contribution exists for instance if, in a system of a two chamber parliament, both chambers have the right to elect a certain number of constitutional judges.

Above all, it was the judicial power that has given rise to much discussion within the separation of powers doctrine. It was held, by Montesquieu and others, that the judiciary had no limiting function vis-à-vis the legislator. This is true, as far as the ordinary judge is concerned, who is strictly bound by law and who is not empowered to decide on the constitutionality of laws. However, this is not true for the American type supreme courts and for the constitutional courts to the extent that they can effectively limit the power of legislation to the boundaries of the constitution.

The separation of powers does not, however, create the independence of courts in general and of the constitutional court in particular. The material requirement of independence is not replaced by an abstract principle. Its function is limited to assisting the material guarantee of independence. We can see this relationship more clearly, if we imagine the following: if there were mixed powers of legislation and executive and both were under the effective control of an independent constitutional court, we would find the power of government limited,

although there was no classical separation of powers in the triadic sense of Montesquieu.

4. Independence of Constitutional Courts and the Legislature

As constitutional courts are empowered to set aside laws and statutes, legal theory describes them as «negative legislators». Legal theory has done so since the early 20th Century. However, this is only one aspect of the influence of constitutional courts on the legislative power: the constitutional judge is inevitably and on a permanent basis close to the powers of the legislator in a «positive» sense as well. Let me enumerate three features of a possible positive interference of constitutional courts with the legislative power.

a) «*Interpretation in conformity with the constitution*»: in many systems, constitutional courts have a certain discretion when they make a decision during norm control proceedings concerning the constitutionality of a legal rule on whether to annul the law or to interpret it in a way that makes it conform to the constitution. While at first sight they preserve the integrity of the law, it is not always an act of judicial self-restraint. Especially in cases where the legislature has obviously intended a solution which the constitutional court found unconstitutional, the court substitutes the original meaning with a new one, it is materially «amending» the law. In cases where the legislator could have chosen another solution that was also in line with the constitution and taking into account the fact that the majority in parliament would have opted for a different solution, the approach may limit the legislature de facto in its range of action.

b) *Guidelines for new legislation:* Sometimes constitutional courts do not restrict themselves to just saying what is absolutely necessary in giving the grounds for the annulment of a law. In fact, they go on in their reasoning and present to the parties of the proceedings and above all to the legislature, guidelines for future legislation. In systems, where the constitutional court is commonly accepted by all political parties and has gained high authority, such guidelines may have a considerable impact on the legislative process following the annulment of a legal rule.

c) *Constitutional courts supplementing Parliament:* there may be situations where legislation was necessary according to the constitution or simply for practical reasons, but there was no consensus in Parliament for a solution. Under such circumstances, it is possible for one of the conflicting parties to submit a more or less political question to the constitutional court, which is often willing to decide that question by means of constitutional law.

Constitutional courts regularly come close to the boundary between judicial power and legislative power — which is neither a straight nor a clear one. And there may be situations in a constitutional system where a constitutional court steps over this line without being accused of abusing its power.

If we are aware of that matter, we are also conscious of the legislature's political discretion; it enjoys a «margin of appreciation» especially in complex situations involving technical questions of any kind where the *ex ante* view of the legislature is necessarily different from the *ex post* view of the constitutional judge. Constitutional courts will also take into account the strong material democratic legitimacy of a decision of a parliament, which the court will not replace with its own assessment in situations of political discretion.

The extent of the judicial self-restraint will vary from country to country and from one field of legislation to another. Nevertheless, there are common lines in a comparative perspective, common lines that are drawn by international courts, especially regional courts such as the European Court of Human Rights or the Interamerican Court of Human Rights. These courts have set standards in the past with respect to many human rights guarantees and they have defined areas where the member states enjoy a larger margin of appreciation and situations where there must be a stricter control by the international judge. It may well be held that this theory of «margin of appreciation» has some impact also on the separation of powers in the internal constitutional system.

It is not a coincidence that the question of margin of appreciation — and with that a special feature of the separation of power — has appeared in the field of human rights. Decisions on human rights' questions often entail defining public and private interests, balancing

these interests and making a choice of preference for one or the other. In a number of cases, human rights decisions reflect a social change, answers given by the legislature and ultimately by the constitutional court reviewing the legislation are in a certain sense «political answers».

The famous phrase «Constitution is what the constitutional court says it is» seems to describe the reality in some of the countries where the constitutional courts enjoy a strong position. From a theoretical separation of powers' perspective, however, this is not a fully adequate description of the separation of powers: Parliament remains in charge. It can change the constitution when it is of the opinion that the constitutional court has interpreted the constitution in a way that was not intended. In other words: with respect to constitutional law, it is not the constitutional court but Parliament that has the «last word», although the requirement of a two-thirds majority will usually — if the Government does not have such a majority in Parliament — not lead to a reaction by the legislature.

The more powerful reaction to the case-law of a court may be exercised by nominating judges that are closer to politics. The effect and the possibilities in this respect depend largely on the national rules on nominating judges. There is a wide range of requirements, procedures and other criteria in different countries. From a general perspective, professional requirements, long terms of office and a fixed age-limit, the division of rights to present candidates among various state organs and qualified majorities in election proceedings will reduce the possibilities of influencing the composition of a constitutional court as a reaction to certain case law. The Russian system is a good example for this practice. Judges are nominated by the President and appointed by the Federation Council of Russia. In order to become a judge of the Constitutional Court, a person must be a citizen of Russia, at least 40 years of age, have legal education, have served as a lawyer for at least 15 years and have «recognised high qualification» in law.

A developed constitutional culture will provide additional safeguards against any discretionary reaction by Government or Parliament. In Russia, fully in line with international standards, no judge of the Constitutional Court may be a member of the Federation Council,

a deputy of the State Duma, other representative bodies, hold or retain other public or social office or engage in entrepreneurial activities apart from teaching, academic or other creative activity. A Russian constitutional judge may not belong to political parties and movements.

This leads me to my final point in this part of my speech. The constitutional judge who respects the separation of powers between legislation and the judicial control of legislation will take due account of the margin of appreciation, of political questions and of the democratic legitimacy of decisions of Parliament. In turn, it may expect the unlimited respect of parliament for its own decisions, which aim to enforce the supremacy of the constitution over legislation and the executive.

5. Independence and Separation of Powers — General conditions of an effective constitutional control in transitional systems

The situation is of course different in transitional societies, where this respect must sometimes still be attained. Here, we need conditions that cannot be created by the constitutional courts; they can only contribute to a step-by-step development of the legal system and the societal environment. They have to be a role model for other constitutional organs in using the legal method when interpreting the constitution, strict obedience of rules of conduct, take account of international standards and thereby give support to the individuals when they are seeking the protection of their fundamental rights. A number of constitutions of transitional systems might still need some clarification in defining the powers of the state and their relationship to each other. Above all, discrepancies between the texts of the constitutions and constitutional reality must be reduced, and constitutional culture must break ground in all spheres of exercising state powers.

Today, constitutions and constitutional courts in transitional systems have much less time to develop and reach certain standards in comparison to the time institutions had in the 19th and 20th Centuries. However, from an international and a comparative perspective, today we find a rich experience of how to implement constitutional judicial review in situations of transition. Let me take up a few observations of possibilities and risks constitutional courts face in transitional systems:

* First, if we look at older systems, we can see that the current standard was not reached in an instance. A number of steps needed to be taken, sometimes in difficult situations. The step-by-step-approach has proven to be the best way to improve judicial standards.

* A second point is the role of human rights today, both on an international and on a national level. We find a body of case law of regional human rights courts, practice of UN institutions and case law of national constitutional courts that is exchanged between the courts on a bilateral and on a multilateral basis. Learning from the experience of others and learning from each other's contributions to the quality of constitutional justice all over the world and in many fields of constitutional law, above all in the field of human rights, has become a decisive factor of success.

* Third, it seems that constitutional courts have to gain faith, trust and self-confidence over a certain period of time. Trust by society and legal experts is gained by a predictable practice, case law with a clear methodological basis, where former decisions are quoted to show a consistent «line».

* It is one of the most important tasks of constitutional courts to develop values behind the provisions of the constitution. In doing so, the constitutional court also has the possibility of establishing the consensus in a young democracy, which might not have existed when the State was founded.

* Judicial courts that have a procedural law where the court was a neutral arbitrator between parties have proven to be successful. For this reason, adversarial proceedings tend to strengthen independence. In such a system, the constitutional judge is not a public prosecutor in charge of defending the constitution, he or she should be the neutral guardian. Against this background, the competence to institute proceedings ex officio has to be seen with scepticism.

* A court that is not in the position to work efficiently will not be an effective guardian of the supremacy of the constitution. It is therefore a danger when a constitutional court is confronted with an enormous workload from the very beginning, producing a backlog of cases that increases from year to year.

* In traditional systems, the role of international courts cannot be estimated high enough. International and regional courts strengthen internal independence, especially in systems of transition. Where there is still a lack of internal consensus, the authority of a long existing international institution accepted by the large majority of states concerned will help to stabilise the system in general and the constitutional court in particular.

6. Three factors contributing to the independence of constitutional courts

Let me return to the general perspective and put my topic in the following question: what factors may — if they work or are used in a positive manner — strengthen independence of constitutional courts in modern democratic societies governed by the rule of law or in conditions of societal transformation?

Three factors seem to be of particular importance: ethical standards for and of constitutional judges, a constitutional culture of respect for constitutional justice, a well-balanced role of the mass media, the protection of individual rights and international co-operation between constitutional courts.

a) *Ethical standards of judges*

In countries where the constitutional court is an effective organ, it follows from the competencies of the court that it deals with questions of a «political» nature. Human rights, disputes on competencies of the highest organs under a constitution, the annulment of a government decision or the annulment of a law very often entail «political» questions. It is therefore not excluded that the single judge or the court as a whole comes under political pressure in certain circumstances. Sometimes the legislative rules on the court reflect this danger and they address this danger with specific and concrete safeguards. Sometimes they do not. It would not be appropriate to draw conclusions from the extent of legal regulation about the quality of independence of constitutional courts for the following reasons.

The extent to which independence of constitutional courts is respected by Government and Parliament highly depends on the political and constitutional culture of a given state. Very detailed regulations

may not be worth much where there are subtle mechanisms of influencing judges or where pressure is actually exercised on them. Rather vague rules may be sufficient where the court and its judges are respected as ultimate guarantors of the constitutions.

b) *Constitutional Culture*

Having said this, I must add that constitutional culture is not a thing which exists without an alternative and which cannot be influenced. Admittedly, the starting point for one constitutional court may be more difficult than that of another, taking into account the history of a state and the history of its constitution. However, in every situation it is in the hands of Government, civil society including above all the media and not forgetting the judges themselves, to enhance the respect for the constitutional court and thereby also its independence. On the other hand, even under «mature» democracies, where the constitutional court has reached a strong position, confidence and independence may be in danger and may be hampered by Government, the media or the judges themselves.

Let me identify two factors of culture I chose out of many others.

Election process: Most constitutions have more or less similar criteria for the election of constitutional judges, a working group will produce a report showing common grounds as well as differences. One feature shared by quite a number of constitutions is the existence of clear criteria for the qualifications and rules that anticipate that a single political party may not decide on the composition of the courts. This procedure produces plurality in the court, and plurality is an important factor, if not a legal precondition for the independence of constitutional courts. On this basis, transparency in electing constitutional judges and choosing women and men that have gained respect in their former professional life, irrespective of their political beliefs, enhances the independence of courts. Self-restraint of the political class in electing new judges that have spent most of their former professional life in politics is also important.

c) *The Role of the media*

The media have a role that should not be underestimated. In modern society, the publication of decisions in official collections of judgments

or in law journals is still important; but it is not decisive for the overall perception of the performance of a court. Long before these publications appear, there is a public debate in the media on the content of decisions, its reasoning and its consequences. In this situation, the media bear responsibility for the proper perception of court decisions, and it is a common feature in democratic societies that the media strengthen and support the independence of constitutional courts by giving them a voice in the public debate.

Having said this, I turn to the dangers of the relationship between the courts and the media and to the duties of the constitutional court. The courts must be aware that their decisions may be perceived differently in a general political debate than in the circles of specialised (constitutional) lawyers. That means that a judge drafting a decision must bear in mind that it will be read by non-lawyers while keeping the standards of legal reasoning. Sometimes, a «translation» of a judgment for the public may be required — for instance by means of press releases. The European Court of Human Rights gives us an example of good practice in informing the European public and the public of the Member State concerned. Beyond this task of «translation», the Court and its judges should refrain from «interpreting» the judgments. In any event, it shows that there is a fine line between informing and translating a judgment, on the one hand and interpreting or even commenting it, on the other hand.

7. Conclusion

Ladies and Gentlemen! Let me conclude:

20 years have passed quickly. In a few years time the Berlin wall — being a symbol for the Iron curtain that divided Europe for some three decades — will be torn down for a longer period than it had actually existed. This simple comparison is the basis for my final remark: If we look 20 years ahead we will hopefully have reached a point where it is not appropriate to make any difference between so called «new» and «old» democracies. We should than share a common European heritage of constitutional culture, including separation of powers and a fully independent Constitutional justice in all European States.